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In the

Supreme Court of the United States

No. 834

CITIES SERVICE OIL COMPANY,
Petitioner,

vs.

B. P. DUNLAP, ET AL.,
Respondents.

OPPOSING BRIEF TO PETITION FOR WRIT OF CERTIORARI

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To the Honorable Supreme Co rt of the United States:

The only issue properly before this Court under the petition is the asserted error of the Circuit Court of Appeals in finding that the call in the description in question for the W. H. Rogers line was not a call for a controlling monument and did not control the distance call.

As the facts and findings necessary to the determination of such issue are likewise involved in the review of the judgments below in the light thereof, in response to the cases and arguments of petitioner, respondents believe the latter course will more readily reveal the futility of the petition as a whole.

THE JUDGMENTS BELOW, IN THE LIGHT OF THE LAW OF TEXAS, UNDER THE FINDINGS OF BOTH COURTS

Petitioner here seeks to present as the law of Texas that, in some manner not revealed, a mere barren plea or claim of bona fide purchaser places an ambiguous boundary description beyond the purview of the established rules of construction and completely bars any inquiry or evidence as to the intent of the parties with respect thereto.

In other words, petitioner's position is and has always been that, having assumed itself a bona fide purchaser under its own interpretation of the ambiguity in question, neither evidence nor law properly applicable thereto can divest it of such asserted status.

Petitioner seeks to assert this barren claim against the conclusive findings of the courts below, mostly derived from its own evidence. The adjoinder upon which it solely relies for its claimed status of bona fide purchaser is at variance with the called distance, at variance with two other calls in its description, and at variance with the contiguity of its parcel of the partition with the other parcels thereof. It is at variance with the possession and acquiescence of its own lessors for more than thirty years—evidenced by a fence for some twenty years and by a large iron monument marking its southwest corner for more than twenty-five years. Its contended adjoinder call could not be respected without leaving an unpartitioned area between its tract and other parcels of the partition as surveyed on the ground according to its own evidence. Said contention is also at variance with the actual survey on the ground and the stakes set by the surveyor for

the partition. Further petitioner contends the line was never surveyed, and there being proof in the record and a finding by the Court as to a parol agreement which would determine such boundary as contended by respondents and as found by the Court, which parol agreement has been evidenced by possession, fence and iron monument (Exhibit 39, R. 297) for more than thirty years, petitioner could not claim contrary thereto and is bound thereby, even without other notice than that disclosed by such possession, and even though such line were entirely contrary to its ambiguous deed. These facts are reflected in the findings and conclusions of the trial court; are abundantly supported by the record; most of them were derived from petitioner's own evidence, and none of them have in anywise been questioned or repudiated by the Circuit Court of Appeals as obviously or in anywise wrong. The finding of the trial court as to the ambiguity upon which it admitted extrinsic evidence (Finding No. 19, R. 69) was not excepted to by petitioner as factually wrong, or not supported by the evidence. Upon the other hand, the Court expressly states it was derived from petitioner's evidence alone.

Upon such a record, petitioner insists before this Court, as the law of Texas, that its thus obviously barren plea of bona fide purchaser completely inhibits any application to such evidence and findings of the established rules of law relative thereto; that its plea alone gives it title—ex parte, conclusive, fiat and final.

It is hardly needful for respondents to emphasize that such a strange and alien doctrine is nowhere reflected in our jurisprudence. As a matter of fact, the authorities

are so abundant and unanimously hostile to petitioner's contention as to reflect profound doubt it would have been urged in our own courts. Whether born of unwarranted zeal or a desperate hope of judicial hebetude, response to it is a duty apologetically undertaken and one which can be pursued only in embarrassing and mounting consciousness it might be construed as unwarranted deference to the latter unflattering implication.

This case involves no such incredible misapplication of the law of Texas as the petition seeks to present. As a matter of fact, the whole controversy is extremely simple in outline, involving naught but anciently determined and still valid and subsisting principles of law of almost universal application, which have governed such cases from the very beginning of Texas jurisprudence.

Upon the evidence properly admitted to explain the ambiguities in petitioner's leasehold title description, both courts below held that petitioner thereby acquired no interest whatsoever in the land in controversy, which was tantamount to a factual finding by said courts that petitioner was not a purchaser thereof, bona fide or otherwise.

Rather than burden the Court with an extensive presentation of the multitudinous authorities on the admissibility of parol evidence to interpret a latent ambiguity or a vague, uncertain and indefinite description of land, respondents call to the attention of the Court the brief and annotations set forth in **68 A. L. R., pp. 5 et seq. and pp. 15 et seq.**, in which it will be noted that in support of the general rule there stated more cases are cited from Texas than from any other State. Thus it will be manifest to

the Court that in this case it is not called upon to consider or apply the unfamiliar rule and interpretation presented in the petition and supporting brief herein.

RESUME OF PERTINENT FACTS, FINDINGS AND CONCLUSIONS

Petitioner brought this action in the district court to quiet title, alleging the land in controversy to be a part of its leasehold estate, being Lot No. Two of the partition of the Louisa Rogers Estate, as described in paragraph II of petitioner's Amended Bill of Complaint (R. 21). No plea of bona fide purchaser was involved in petitioner's suit, but such plea was by it defensively interposed in paragraph IV of its Reply to respondents' cross-action (R. 43).

From petitioner's own evidence, the trial court found petitioner's title description was latently ambiguous. In its Finding of Fact No. 19 (R. 69), the Court states:

> "The Court finds as a fact that the surveyors of the complainant testified that there was an ambiguity in the partition deed and in the lease of the complainant when it was attempted to be applied to the ground, and, **upon such admission of ambiguity,** the Court heard evidence as to the footsteps of the original survey at the time of the partition and as to the intent of the parties in making such instrument."

As respondents have stated, such finding was not excepted to by petitioner as factually wrong or in any measure against the weight of the evidence.

From the evidence so admitted, the Court made full findings of fact and conclusions of law (R. 58-72) none of which are mentioned in the petition before this Court and

none of which were in anywise questioned, criticized or repudiated by the Circuit Court of Appeals as obviously or in anywise wrong. Said Circuit Court of Appeals contented itself with a still further purported finding of ambiguity which is the sole basis of petitioner's case before this Court.

As none of the undisturbed findings and conclusions of the trial court are presented in the petition herein, though most are indispensable to a consideration thereof, they should all be read and considered; however, more especially vital for consideration in said behalf are those referred to and fully quoted below:

FINDINGS OF FACT

No. 7 (R. 62, 63 and 64): "Detailed findings as to actual survey made.

No. 9 (R. 65, 66): "Replacing Surveyor's stake with massive gear-shaft and pinion wheel, at southwest corner of Petitioner's Leasehold and between it and the land in controversy (Photograph, Exhibit 39, R. 297).

Nos. 14 and 15 (R. 67-68): "That neither petitioner nor its lessors, by their deed and lease acquired any interest in the land in controversy.

No. 16 (R. 68): "That adjoinder call upon which petitioner solely relies was a mistake.

No. 19 (R. 69): "Finding of ambiguity hereinbefore quoted (not excepted to as factually unauthorized)."

CONCLUSIONS OF LAW

No. 2 (R. 69): "That adjoinder call on which petitioner solely relies for title should be rejected as in

conflict with remainder of title description and partition as a whole, and with subsequent interpretation, conduct and acquiescence of parties thereto for more than 30 years.

No. 3 (R. 70): "That Respondent Dunlap is entitled to have his title to such tract of land quieted as against complainant on his plea for affirmative relief."

Conclusion No. 4 is so vital and comprehensive it is necessary to set it forth in full (R. 70-71-72).

"4. The Court concludes that extrinsic evidence was admissible to show that the Surveyor Simmons, at the time he made the partition survey, placed a stake at a point 880 yards west of the northeast corner of the said Thomason Survey for the northwest corner of the J. F. Rogers tract, and another stake 880 yards south thereof at a point now, **and for more than 30 years, located by the old gear wheel."** (Marking the southwest corner of petitioner's lease and between it and the land in controversy). "Also, extrinsic evidence was admissible to prove that one of the stakes was removed and the gearshaft placed where said stake was originally driven, as the Court concludes that the correction lease obtained either does not cover the 66 feet involved in this controversy or it takes in more land than it was represented to cover at the time it was obtained.

"The correction lease and the original lease, separately and taken together, when application of the calls is made to the land on the ground, create an ambiguity and, when taken in connection with the description of the partition deed to J. F. Rogers, create an ambiguity. If effect is given to the call 'thence west 440 yards to the northeast corner of the Wiley Davis

tract; thence south 880 yards; thence east 224 yards; thence north 310 yards at 12 deg. E. of north; thence East 154 yards to W. H. Rogers' line; thence North to the beginning, IT WOULD LEAVE OUT A STRIP OF LAND 68 FEET WIDE WEST OF THE J. F. ROGERS OLD FENCE, **along the line North 310 yards at 12 deg. E. of North, for, if you run from the southwest point, as claimed by the complainant herein, at a point 880 yards south of the northeast corner of the Wiley Davis tract of land, and then run East 224 yards (the call in the original partition deed and in the original lease to W. P. Chandler and in the assignment from Chandler to the complainant), there will be 68 feet between J. F. Rogers' fence and the call distance; then to run north 310 yards at 12 deg. east of north, there will be 68 feet between the line as called for and as surveyed and the fence line of the Rogers tract of land.** THIS AMBIGUITY, FROM ALL THE FACTS, COMPELS THE CONCLUSION THAT THE INTENTION OF THE PARTIES WAS NOT TO TAKE IN THE 68 FEET WEST OF THE GEAR WHEEL, IN CONTROVERSY, AND THAT IT WAS PURPOSELY LEFT OUT OF THE PARTITIONED LAND. Furthermore, when the complainant, Empire Gas & Fuel Company, represented to the heirs of J. F. Rogers that their correction lease did not cover any more land than the original lease, and thereby obtained the same, it is in no position now to claim otherwise, in an equitable action. IN OTHER WORDS, IF THE COMPLAINANT WERE ENTITLED TO RELY ON THE CALL TO THE WILEY DAVIS CORNER, AT THE NORTH, IT WOULD BE CONFINED TO THE CALL OF 224 YARDS EAST FROM THE POINT 880 YARDS SOUTH OF THE SAID CORNER, AND A STRIP OF 68 FEET WOULD BE OUTSIDE THE CALLS OF THEIR LEASE ALONG THE EAST SIDE THEREOF." (The

Court here continues with further elaboration of said ambiguity, but the foregoing will suffice for an adequate presentation).

Said quoted findings and conclusions of the trial court were derived from petitioner's own evidence alone. As a matter of fact, as the trial court shows, they are inherent in petitioner's own title description, taken in connection with the other partition deeds and its chain of title and facts petitioner was bound to know. So long as the law provides that parol evidence is admissible to explain and govern the interpretation of a latent ambiguity in a title description, any purchaser under such a description is obviously charged with knowledge of the facts revealed by the application of such title description to the ground. If his description will not cover land he thinks he is buying, a plea of bona fide purchaser will not include it.

Petitioner did not except to the correctness or factual support of the Court's aforesaid finding of fact, nor of the Court's said cited conclusions, but contented itself with excepting to the admissibility of parol evidence to explain the ambiguity found from its own testimony, and with excepting to the legal effect of the Court's stated conclusions, without questioning the factual foundation thereof or the evidential warrant therefor.

The findings and conclusions above quoted were not questioned or repudiated by the Circuit Court of Appeals as either obviously or in anywise wrong; said Circuit Court instead resting its judgment upon still further purported findings, of ambiguity, which, whether authorized or not, in nowise lessen the applicability of its affirmative judg-

ment to the ambiguity found by the trial court, as set forth above, which was not excepted to by petitioner as factually unsupported or in any measure against the weight of the evidence.

Upon said quoted findings and conclusions, the trial court, in its Decree (R. 52) first determined that petitioner in its own cause of action had shown "no right, title or interest" in the land in controversy, and so decreed; then, upon their cross-action, rendered judgment quieting respondents' title thereto.

Under the law of Texas, the Court, having first determined that petitioner by its lease acquired no title or interest in the land in controversy, by such stated determination conclusively negatived petitioner's plea of bona fide purchaser set up in its Reply to respondents' cross-action; and having so disposed of petitioner's case, there was no occasion for the Court further to pass upon petitioner's plea of bona fide purchaser in respondents' cross-action. As said by the Supreme Court of Texas in **Simonds et al. v. Stanolind Oil & Gas Co. et al.**, 114 S. W. (2d) 226 (234):

> "It is necessary to the successful assertion of their claim as innocent purchasers for value of the undivided one-half interest that passed to Margaret Simonds under the unrecorded deed that they show that they have acquired the apparent title or the legal title as appearing of record to that half interest. Waggoner v. Dodson, 92 Tex. 415, 422, 73 S. W. 517; Temple Lumber Company v. Broocks (Tex. Civ. App.), 165 S. W. 507, application for writ of error refused; 43 Tex. Jur., pp. 621-622, Sec. 366." (And, on page 235):

> "Having reached the conclusion that defendants in error failed to prove that they acquired the apparent record title to the undivided one-half interest in the land in controversy that was conveyed by Ellen Smith to Margaret Simonds, we need not determine whether the claim of innocent purchaser was defeated by the deed made by T. B. Weathersby to T. P. Campbell April 4, 1916, and duly recorded."

The foregoing has been the uniform holding of our Supreme Court, and it is thoroughly established in Texas that before the plea of bona fide purchaser can be considered such pleader must first have proved that he actually acquired the legal or apparent record title to the land in controversy. As said by Chief Justice Phillips of our Supreme Court in **Hennessy et al. v. Blair,** 107 Tex. 39, 173 S. W. 871, 872:

> "As a rule, the equity of an innocent purchaser is incapable of assertion without the ownership of the legal title. York's Admr. v. McNutt, 16 Tex. 13, 67 Am. Dec. 607; National Oil & Pipe Line Co. v. Teel, 95 Tex. 586, 68 S. W. 979."

Thus, the judgment of both courts below holding that petitioner did not by such adjoinder call acquire the legal title or apparent record title to the land in controversy, its plea of bona fide purchaser was out of the case. The protection of such plea extends only to such valid estate as the instrument relied upon unquestionably purports to convey. Such plea is seen, therefore, to be no stronger than the conveyance upon which it rests. As said by our Supreme Court in **York v. McNutt,** 16 Tex. 14, quoting from **Chew v. Barnett,** 12 L. & R. 380:

> "When it is asserted that a purchaser for a valuable consideration takes the title free of every trust or

> equity of which he has no notice, **it is intended of the purchase of a title perfect on its face; for every purchaser of an imperfect title takes it with all its imperfections on its head.** It is his own fault that he confides in a title which appears defective, and he does so at his own peril."

And in **Gilmore v. O'Neil,** 107 Tex. 18, 173 S. W. 203, our Supreme Court, in a case of striking similarity to the instant case, in which the plaintiffs were claiming as bona fide purchasers, defined the legal status of their claim as follows:

> "The claim of plaintiffs was predicated upon their asserted ownership of a leasehold supported by the legal title, because of the description in their lease. * * * **Essential to the allowance of their claim is the determination that the description in their lease was sufficient. * * * If their lease did not describe the land, the plaintiffs had no character of title."**

Obviously, therefore, if appellant placed its reliance upon a call for adjoinder which, under the description in question, must as a matter of law be ignored as a mistake, no plea of bona fide purchaser can emend its indiscretion; give sanction of title where none was legally purported, or impose upon appellees a burden of refutation more emphatic and conclusive than appellant's utter failure to acquire any title whatsoever to the land in controversy through the deed in question.

Petitioner attempts to make it appear the courts below, upon plea of mistake and against a bona fide purchaser, corrected such mistake by reformation of the deed after the lapse of more than 30 years, contrary to the law of Texas. These contentions are doubtless made from the

fact in their answer respondents did allege such called-for adjoinder was inserted in the J. F. Rogers deed by mistake at the time of the partition. But it must not be assumed the determination of the courts below was upon such equitable ground; there is ample authority to support the action of the Court without any implication of reformation.

As contended by petitioner, the law of Texas as to the interpretation of partition deeds is the same as that involved in systems or blocks of surveys, and it follows and adopts the Federal rule in that regard, as shown by petitioner's cited authority, **Standefer v. Vaughan** (Tex. Civ. App.), 219 S. W. 484. In this case and multitudes of others it is held that said field notes may not be interpreted to leave vacant and unsurveyed lands between said surveys. This has been held applicable, as well, to field notes of partitioned tracts. **Beck v. Gulf Production Co.**, 113 S. W. (2d), 258 (W. E. refused). Yet, consulting the findings and conclusions hereinabove quoted, it will be found that following petitioner's contention and giving effect to the adjoinder call in this case leaves an area of equal width to that in suit lying between petitioner's leasehold and Lot No. 3 of the partition; whereas, if such adjoinder is ignored as a mistake, said partition parcels remain contiguous and in perfect harmony.

Further, it is well settled in Texas that such a finding of ambiguity authorizes reversal of the calls in such an ambiguous instrument; and if from its called-for beginning point, the field notes of petitioner's lease and supporting partition deed are laid down upon the ground in reverse order the call for adjoinder is shown to be

wholly mistaken and such field notes are found to be in perfect harmony within themselves and in their relation to all the other parcels. This rule is most frequently applied in Texas in the construction of such ambiguous field notes. **Carlisle v. King,** 103 Tex. 620; **Swenson v. Willsford,** 84 Tex. 424; **Miles v. Sherwood,** 84 Tex. 485; **Ayres v. Harris,** 64 Tex. 299.

But there are many cases wherein the exact construction applied by the courts below was followed and for practically the same stated reasons. The Supreme Court in **Blake v. Pure Oil Co.,** 100 S. W. (2d) 1009 (1012), which involved an adjoinder call in a parcel of a subdivision, had this to say:

> "* * * it is our opinion that such mistaken call should be rejected and the block constructed by course and distance from the southeast corner of the Moore Survey, located in the position where Starr and his surveyor believed it to be * * * because under the facts in evidence such construction is **most consistent with the intention to be derived from the entire description and harmonizes the other terms of the field notes.** This construction is the same in effect as a construction of block 7 by course and distance from its southeast corner on the undisputed west line of the Walling survey, the location of which southeast corner is proven by evidence hereinafter discussed. **When block 7 is thus constructed, the lengths and courses of its lines are the same as those given in the field notes and shown on Starr's map, it has the acreage called for in the deed and marked on the map, and it does not conflict with block 5, block 6, or block 8, or with the Juan Prado Survey."**

And in **State v. Sullivan,** 92 S. W. (2d) 228 (233), the Supreme Court disposed of such an adjoinder call in conflict with the distance call and otherwise ambiguous, as in the instant case, as follows:

> "* * * where the facts conclusively show that the surveyor through mistake or by conjecture called for the adjoinder, the call for adjoinder does not control over course and distance, even though the line or corner called for was marked. In such situation the call for adjoinder will be rejected, as inserted by mistake, and controlling effect given to course and distance from known and undisputed corners, when under the facts of the particular case such construction of the survey is **'most consistent with the intention to be derived from the entire description.' This method of construction by the rejection of a call for adjoinder inserted by mistake is most consistent with the true intention if its effect is to harmonize the other terms of the field notes and to disregard as few of the calls as possible."** (Citing numerous cases).

The above language is quoted and followed in **Humble Oil & Refining Co. v. State** (Tex. Civ. App.), 104 S. W. (2d) 174 (179), approved by the Supreme Court (Writ refused).

That such a construction does not involve reformation, and is of legal application and not equitable, is manifest by the language of the Supreme Court in **Wilson v. Giraud,** 111 Tex. 253, 231 S. W. 1074 (1078), cited by the Circuit Court of Appeals in its original opinion, and likewise cited in those cases quoted from immediately above:

> **"Once testimony is adduced to establish an inconsistency in field notes, parol evidence which throws light upon which call is true and which call is false**

is admissible. The purpose of admitting the parol evidence is not to override that which is written, but to properly interpret it. Where it is impossible to give effect to all that is written, effect will be given to that which may be found to be true."

And when by such construction of the field notes in the deed, considered in the light of the adjoinders called for and the lines of the abutting surveys such field notes can be so harmonized and corrected without resort to a suit for reformation, it is held in **William Carlisle & Co. v. King,** 122 S. W. 581 (Affirmed and approved by the Supreme Court, 103 Tex. 625, 133 S. W. 241) that such a mistake cannot be relied upon to support a plea of bona fide purchaser. The Court of Civil Appeals held:

"In our judgment, however, it sufficiently appears from the face of the deed, when read in the light of such facts as appellants were bound to know—that is, the recitals in the patent to the land they were buying **and the lines of the abutting surveys called for in the deed**—not only that there was error in the field notes but what land, in fact, was intended to be surveyed. * * *

"We must be understood as clearly holding that unless the errors in the deed are of such a character that they can be corrected from the face of the deed, and a suit would not be necessary for this purpose (2 Pom. Eq. Secs. 866, 867, p. 1533, note) the record or filing for record of the deed would not be constructive notice to a subsequent purchaser; **but the converse of the proposition is equally true, and we hold that for this reason the defense of innocent purchaser cannot be sustained."**

And in the Supreme Court, under the same style, 103 Tex. 620, the Court adopted the rule stated by the Court of Civil Appeals and further amplified (page 624):

> "The filing of the deed for record from J. S. A. Chessher and wife to George Burns gave notice to subsequent purchasers of just what was embraced in the terms of the deed **by fair construction.** The rule of construction of deeds is 'that where there is an evident mistake in the calls the court must, if practicable, find out from the deed itself and correct errors so as to give effect to the deed.' Poitevent v. Scarbrough, 103 Tex. 111; Mansel v. Castles, 93 Tex. 414; Coffey v. Hendricks, 66 Tex. 676."

Of course in the instant case this language would be enlarged by the rule urged by petitioner, in that the partition as a whole would be considered and given effect, that not only the deed might be harmonized within itself but with relation to the other partition parcels, avoiding unpartitioned area between parcels of the partition.

The case of **Miller v. Lemm** (Com. App.), 276 S. W. 211, follows the opinion of the Supreme Court in **Carlisle v. King, supra,** quoting extensively therefrom.

The foregoing cases authorize and require the construction of appellant's title description by deleting or eliminating the adjoinder call under which appellant here claims, thereby revealing a wholly consistent description of appellant's leasehold estate, unequivocably applicable to the ground. When this can be done from the description and chain of title, considering the location of the adjoinder called for, as declared in **Carlisle & Co. v. King, supra,** appellant's lease and deed are held to be constructive notice

to it that it acquired no estate whatsoever in the land here in controversy, could not in law have contemplated it in its purchase nor in good faith claim it against the ancient legal estate of respondents, and for that reason its defense of bona fide purchaser cannot be sustained.

Traditionally, in Texas, quantity has been the least considerable of the elements involved in the determination of boundary lines. Originally, land was of negligible acreage value, and it seemed every other factor was of more importance and reflected more light upon the intention of the parties to a conveyance than did the element of quantity of land called for. But apparently our courts have begun to consider that oil and mining lands are of great acreage value; that they are bought and sold upon an acreage basis and not in bulk and often, as in the instant case, three or four acres of oil land are worth more than twenty-fire or thirty entire sections of land were worth at the time our courts first held quantity of land called for as of least moment in the location of a boundary. Multitudes of cases now reach our Supreme Court involving from a fraction of one acre to four or five acres of oil-bearing lands. In the case of **Humble Oil & Refining Co. v. Ellison**, 132 S. W. (2d) 395 (Commission of Appeals, approved by the Supreme Court), it appears the Court either holds that quantity is of greater importance than a call for a natural monument or that this is so where quantity is considered in connection with the element of long acquiescence, as will be presented in **George v. Thomas**, 16 Tex. 74. The acreage variance in the instant case is still greater than that in **Humble v. Ellison, supra**, and the period of acquiescence in the disputed boundary about the same—over thirty years in both cases.

In **Humble v. Ellison,** the question for determination was whether or not approximately nine acres of land was within or north of the north line of a tract called to be 224¾ acres. This 224-acre tract was described by field notes in which the beginning corner, at the southeast, and the corner at the southwest were calls for a creek, said creek being the south boundary of the tract. Giving effect to the called adjoinder with the creek at the southwest corner presented no conflict with any other call in the title description, but the Court found the acreage thereby included was approximately eight acres less than called for in the deed; wherefore the Court proceeded to reverse the field notes from the established southwest corner of the tract, on the creek, but found that the excess in the called length of the west line thereby included approximately eight acres **more** than called for in the deed. However, the Court found that some thirty-five years previously the original lessor, one Wooley, who was a defendant in error in the case, had constructed a fence along what he thought was the north line of the 224¾ acre tract, then owned by him, which fence was approximately half way between the north line as located by the field notes from the beginning corner on the southeast and the north line as same would be established by reversing the field note calls from the established southwest corner, and that Wooley had regarded said fence as his north line during said interval of time. The Court further found that when said fence was taken as the north line, the tract had approximately the 224 acres called for in the deed. Upon these facts, the Court states:

> "In such state of facts quantity becomes a material circumstance. * * * The adoption of that line (the

> fence line) as the true north line of the tract * * * not only gives to the tract of land conveyed by the deed the acreage that the parties to the deed intended that it should have, but it conforms to the construction placed on the deed by the grantee Wooley and his wife, who is a party plaintiff in this suit, thus giving effect to what clearly appears from the evidence to have been the intention and understanding of Wooley when the deed was made."

Plainly here is a case clearly and unmistakably holding that as small a variance as 3.9 per cent between the acreage called for in a deed and the quantity described by the field notes constitutes such an ambiguity as requires and authorizes parol evidence in the determination of a boundary. This is held in a case in which it is plainly manifested from the opinion there could not have been any other ambiguity in the description. Further, it will be noted, the Court in determining the boundary resorted to a construction altogether limited to the long acquiescence, held to be binding on Wooley and his vendees without other notice than the fence and possession in relation thereto during such period. In the instant case, aside from all the other grounds and rules we have presented, and shall yet present, there is a variance of 6% between the quantity called for and that required to meet the mistakenly stated adjoinder; and the period of acquiescence in the instant case was more than thirty years prior to any interest in petitioner or its assignor. Some twenty years of said period of acquiescence the same was evidenced by a fence built by petitioner's own lessors to mark their west line, and for more than twenty-five years was evidenced by large steel pinion and gear wheel, planted by petitioner's own

lessors, prior to which time said location, according to the evidence and findings of the Court, was marked by the original stake of the Surveyor who ran the partition lines in 1899. This evidence comes not only from F. E. Rogers, one of the original Louisa Rogers heirs who shared in such partition and was one of the chain-carriers on said survey, but from Seth Davis and J. E. Rogers who, at the request of the widow of J. F. Rogers, grantee of Lot No. Two in the partition, replaced the surveyor's stake at the southwest corner of said Lot No. Two with the large steel or iron monument above referred to, a photograph of which is shown as Exhibit No. 39, page 297 of the Record. During all of said time said monument has been recognized not only by petitioner's lessors, as marking their southwest corner, but by the owners of Lot No. Three, on the south, as their northwest corner. There is ample testimony in the record such monument was generally known in the community as marking the corners and boundaries aforesaid. When a land owner has planted a monument of the character in evidence in this case to mark a corner and such monument remains unquestioned for more than twenty-five years and is found in harmony with all the adjoining land, as well as all the distance calls in the owner's deed, and when forever subsequently he has confined his possession thereto, most obviously he meant **corner** and **boundary** and, after such a long period of acquiescence it has always been the law in Texas that irrespective of any variance with the description in question and without other notice than possession and occupancy during such period in relation thereto, his vendees cannot claim a boundary contrary thereto. (See An-

notation, and brief, 69 A. L. R. 1491, and Texas authorities cited under general rule).

From the very earliest time in Texas our courts have applied this rule, and the foregoing authority, **Humble v. Ellison,** manifests our Supreme Court yet holds to it. Frequently the language in the opinions is so vigorous in affirmance of the rule as to suggest the advocate instead of the jurist. We could use no stronger language against petitioner's claim of legal title and bona fide purchaser on the strength of an adjoinder call (at variance with the possession of its lessors; at variance with the called distance; at variance with a fence maintained by its lessors for some twenty years and with a large iron monument marking the accepted line, and at variance with the contiguity of the partition descriptions as a whole) than the language used by the Supreme Court of Texas in **George v. Thomas,** 16 Tex. 74 (90) upon a very similar state of facts:

> "The acquiescence of the parties under whom the plaintiffs claim for so great a lapse of time, under the circumstances, ought to bind them, if there were no evidence of the express assent and recognition of it by the plaintiffs' vendors. * * * The occupancy by the defendants upon it (the agreed line) was notice to them of their understanding of it; * * * they have **obtained all they bargained for** and have no cause to complain. They cannot set up the rights of the married women from whom they purchased, to maintain rights in themselves which their vendors neither asserted nor pretended to convey to them. They cannot complain that the former did not sell to them all they might have sold by insisting upon a different division. * * * They, in a word, have not shown the pretense of a right to come in, at this late day, and under

> their recent purchases to disturb the peace of the neighborhood and unsettle landmarks and boundaries that have been established and acquiesced in for nearly a quarter of a century. If suits of the character of the present were encouraged, the mischiefs to which it would lead, it may readily be conceived, would indeed be of serious consequences. But fortunately for the peace of society, the well settled principles of the law, no less than reason, justice and sound policy, forbid the courts to encourage or countenance by their sanction pretensions so adverse to private rights and the public tranquillity."

Not merely as another case on acquiescence, but as authority disposing of petitioner's contention that evidence as to stakes set by the surveyor which are not called for or mentioned in the field notes of the deed or lease is inadmissible, respondents quote pertinent elements of the opinion by the Commission of Appeals, adopted by the Supreme Court, in the case of **Gill et al. v. Peterson,** 86 S. W. (2d) 629 (631):

> "The mark or object is of no probative value if the field notes or grant contain no description of it or no reference to it **and there is no evidence directly connecting it with the work of the original surveyor.** But, on the other hand, when it is clearly shown that the mark was made or the object placed by the surveyor at the time he made his survey and for the purpose of marking a line or corner, then the object or mark has probative value (Citing authority). * * * Other authorities indicate that an object or mark not called for in the field notes is admissible to prove the location of a line or corner of a survey when such object or mark is 'identified by the surveyor who made the survey, **or by any other witness who was present with him at the time, as having been so placed to mark his foot-**

steps'" (Citing authorities). * * * "The obvious reason for this qualification of the rule is that testimony of the surveyor who made the marks or of some other person who was present when they were made is direct and primary evidence as to the place where the line of the survey was actually run."

And, as to acquiescence, on page 633 the Court says:

"A short time later they built their division fence on the east line as the surveyor had marked it and acquiesced in this line for nearly ten years. In view of these facts, the footsteps rule cannot be disregarded. Application of the other rules of construction to which reference has been made would defeat rather than make effective the intention of the parties."

The cases following the rule here urged are so numerous in our reports as to render it utterly futile and a mere annoyance to the Court to further discuss or refer to them.

Petitioner seeks to acquire title to the land in controversy upon the stated Texas rule of law that where a tract of land is partitioned among the joint owners, the presumption obtains that the whole land is partitioned, unless some portion thereof is expressly excepted.

The trial court has held and found that a proper legal construction of petitioner's field note description conclusively reveals that it was not the intention of the parties to include the land in controversy in the J. F. Rogers deed, but compels the conclusion it was the express intention of said heirs to exclude it therefrom (R. 71; this Opposition, pages 7-9).

Further, the testimony admitted to explain the ambiguity found in petitioner's title description (R. 222) and

the Court's Finding thereon (Finding No. 7, R. 63) conclusively reveal an express parol agreement of the parties, made in the course of the partition survey, to retain the land in controversy under common or joint ownership. As respondents will subsequently herein show, partition may be by deed or by parol, or it may be partly by deed and partly by parol; and the land in controversy having been so expressly segregated from the land covered by the partition deeds and its lines and corners having been marked, fenced and acquiesced in by the parties for more than thirty years prior to petitioner's purchase, petitioner cannot claim the land here in controversy upon the basis of any presumption or rule of legal construction, and under the law of Texas is bound by such parol agreement without other notice than the aforesaid manifested possession and acquiescence. Petitioner's contention that the line here in controversy was never surveyed (though wholly contrary to the evidence and findings) make the rules governing parol partition only more conclusively applicable against it.

But even in the absence of these facts and findings, sufficient in themselves, as a matter of law, to bar the application of petitioner's urged presumption, it does not follow that by such presumption the land in controversy would be added to the J. F. Rogers tract or petitioner's leasehold. If the adjoinder call is untenable, as held by the courts below, and the course and distance calls do not govern, as contended by petitioner and held by the Court, the law of Texas requires the equitable apportionment of any excess so found to be undivided. Petitioner therefore again finds itself shorn of claim and barren of right by the presumption urged, or otherwise. See Stano-

lind Oil & Gas Co. v. State, (Sup. Ct.) 129 Tex. 547; 101 S. W. (2d) 801, wherein the citation of authorities against a called-for adjoinder in that case largely duplicates those hereinbefore presented. So even this presumption urged by petitioner returns all rightful claim to the land in controversy to these respondents.

FROM THE STANDPOINT OF THE LAW GOVERNING THE INTERPRETATION OF PARTITIONS

While all the foregoing authorities are amply conclusive against petitioner, they are mainly derived from cases involving legal title and conveyance thereof. From the standpoint of one holding under a partition, the law of Texas is utterly hostile to every claim of petitioner before this Court. In the light of the last expression of our Supreme Court, inasmuch as **conveyance** of title is not here involved, petitioner is divested of any warrant for presuming or further contending it ever acquired any interest whatsoever in the land in controversy, and its blunderbuss pattern of legal presumptions and rules of conclusive legal construction are held insupportable under its equity approach to the jurisdiction of this or any other court, in a claim under a partition.

We here call to the attention of the Court the opinion of the Supreme Court of Texas, rendered January 1, 1941, in the case of **Houston Oil Co. of Texas et al. v. Kirkindall et al.,** 145 S. W. (2d) 1074, which just about sums up the law of Texas applicable to this case.

In that case the Kirkindall heirs attempted by deed to partition their inheritance, consisting of certain personal property and the land remaining after certain tracts had

been sold off the homestead 160 acres, which remnant was assumed to be 18 acres on one side of a road bisecting the estate. Unknown to the heirs, there also remained 25 acres on the other side of the road. For the stated consideration of the personal property, certain of the heirs deeded to the others their interest in said realty—the deed being void as to two of them, married women, because of defective acknowledgments. The land was therein described as ten acres and eight acres in a certain general vicinity, but was incapable of location by such description. Said particular description was followed by a general description purporting to include all the remaining land of said homestead. The Court held that, **if considered as a conveyance,** the specific description would be void and the general description would necessarily control—effectually conveying the uncontemplated additional 25 acres, being the land in suit.

However, the Court held the deed manifested on its face it was a partition and therefore, **not being a conveyance,** was not subject to the statute of frauds; further, on its face it disclosed **that there might be an ambiguity,** and, not being a conveyance, the deed was not subject to conclusive rules of legal construction, and parol evidence was admissible to locate the ten-acre and eight-acre tracts; that when this is done ambiguity is revealed in the description, which may be explained and resolved by parol evidence; that while the deed, considered as a conveyance, was void as to certain grantors, it nevertheless was effective as a **parol partition** and subject to the rules applicable thereto; that under said stated facts the grantees in said deed and those claiming under them could not be held to be bona fide purchasers of the 25 acres in suit.

In the instant case, the partition deed in question was not only not a conveyance, but, as respondents have shown by multitudinous authorities, even if it were considered as such it wholly failed to pass title to the land here in controversy.

Under the foregoing cited authority, **where is petitioner's legal title, asserted as a predicate for its suit in equity? And if it had no legal title to the land in controversy, nor held under a conveyance subject to conclusive rules of legal construction, how in equity does it stand before this court upon the petition here contested, challenging the legal integrity of the judgments brought in review upon a barren pretense, both exposed and refuted by the very law it seeks to ravish and claims to invoke—as presented by its final and ultimate exponent?**

PAROL PARTITION

As respondents hereinbefore have briefly stated (pages 24-26) the land here in controversy was set apart by the heirs by parol partition, to be owned in common and not included in their partition deeds (R. 222; Finding No. 7, R. 63). Without properly presenting this phase of the case, as reflected by the record, respondents in the Circuit Court of Appeals in their Argument and Authorities on remand, set forth the conclusive determinations of our courts, from the very earliest time to the present, that such a parol partition and parol boundary agreement and the possession and acquiescence in relation thereto over such a long period of time were permanently binding not only upon the parties thereto but upon their vendees, without other notice than disclosed by such possession, fenced and monumented boundaries and

long acquiescence. But the Circuit Court of Appeals, undoubtedly having in mind petitioner's action alone, held we were not concerned with parol partition but partition by deed. Respondents, however, call attention to the fact they had a cross-action in this case, involving the land in controversy only, which they were not claiming by deed but solely as determined by the expressed and long manifested intention of the parties, not only as reflected by the fact the land in controversy was not included, as a matter of law, in any of the partition deeds, but as fixed, as a part of the partition itself, by parol, and manifested by the possession, occupancy, fences and monuments and over thirty years' acquiescence by all the parties in relation thereto. The last case decided by our Supreme Court applicable to the instant case and partition by deed and parol was decided this year and is discussed immediately above —**Houston Oil Co. of Texas et al. v. Kirkindall et al.**, 145 S. W. (2d) 1074—disclosing that it is yet, as always, the established law of Texas that a partition may be by deed, by parol, or by both deed and parol; and the findings and evidence in the instant case amply manifest that the conclusive rules of legal construction by which petitioner alone seeks to acquire an estate it manifestly could not have contemplated in its purchase are not involved but expressly inhibited in a partition of land—and doubly so in a parol partition, evidenced by over thirty years' possession and occupancy in relation to boundaries plainly visible to any purchaser on the ground.

Respondents will not trouble the Court with a presentation and discussion of the multitudinous authorities holding a parol partition hostile to every claim of petitioner.

If there be any doubt about it the brief and annotations set forth thereon in 69 **A. L. R.** 1433 ought to resolve it.

PETITIONER'S CITED AUTHORITIES DIFFERENTIATED AND SHOWN INAPPLICABLE

The petition herein is predicated upon the asserted authority of four cases—**Garrison v. Crowell,** 67 Tex. 626, 4 S. W. 69; **Miller v. Southland Ins. Co.** (Tex. Civ. App.), 68 S. W. (2d) 558; **Gulf Production Co. v. Baton** (Tex. Civ. App.), 108 S. W. (2d) 960 and **Swann v. Mills** (Tex. Civ. App.), 219 S. W. 850. In the light of all the foregoing authorities conclusively adverse to petitioner, one would suspect there is something wrong with its presentation of the above authorities upon which alone it relies in this case. There is.

The first two of petitioner's above cited cases were plainly decided upon possession openly evidenced in the grantor, upon which alone the purchaser is universally held privileged to rely. The decision of the third case, **Gulf v. Baton,** rested on an agreed boundary—just another authority for respondents.

Petitioner's case of **Swann v. Mills, supra,** has no relation to the facts before this Court. There the Court carefully states the field notes under interpretation were unequivocably applicable to the ground as written; that there was **no ambiguity, either latent or patent,** and then the Court carefully differentiates such facts from the holding of the Supreme Court in the case of **Johnson v. Archibald,** 78 Tex. 96, 14 S. W. 266, 22 Am. St. Rep. 27, which the Circuit Court of Appeals cited as authority in the instant case. But the Court went on further to declare that, in any

event, if there remained any outstanding equity the appellants, who derived title through an entirely different survey to the west, had not connected themselves therewith.

Without these differentiating facts none of petitioner's cited authorities on bona fide purchaser could stand. Certainly, it must appear our Supreme Court has consistently so differentiated and construed petitioner's cases, inasmuch as the use petitioner seeks to make of them is so utterly contrary to the plain and unmistakable import of that Court's multitudinously adverse decisions from its very beginning to the present. These four are all the authority petitioner has ever attempted to assert before any court in this case, and it has repeated and reiterated them in connection with every contention it has presented. Assuredly, if they correctly present the law of Texas as applied to the facts before this Court, on a question so constantly arising, they ought not to stand so pitifully alone.

THE ONLY ISSUE PROPERLY PRESENTED BY THE PETITION HEREIN STANDS UNCONTROVERTED

In the light of the uniformity and conclusiveness of all the authorities against any rightful claim of petitioner under the merits of this case under the finding of ambiguity and other findings made by the trial court upon petitioner's own evidence alone, which finding was not excepted to by petitioner as factually unauthorized nor questioned or repudiated by the Circuit Court of Appeals, it is obvious that neither affirmance nor reversal of the merely additional finding purportedly made by the Circuit

Court of Appeals and here protested by petitioner can in anywise help or injure either party hereto.

Respondents themselves, in their Reply to the Second Motion for Rehearing on remand (R. 383-387) urgently insisted that such finding when made, was merely presenting a controversial issue which petitioner could and would seize upon to endeavor to invoke the jurisdiction of this Honorable Court, though such finding was merely an additional finding to others wholly conclusive whether considered as a record title or an equitable title.

Even if there should be no authority to support such finding and even though it was made by the Circuit Court upon the misapprehension that the call for the W. H. Rogers line was a call for a line fixed by course and distance only and not by actual survey. So far as either have any application to this case, any ruling thereon stands as harmless against both parties, as the record stands. Every fact finding throughout the record shows petitioner never owned a title to the land in controversy.

WHEREFORE, Respondents pray that certiorari be denied.

Respectfully submitted,

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